MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1520

BERNICE THOMAS,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Court of Mississippi (Petitioner's Appendix A) is reported as *Thomas* v. *State*, 285 So.2d 148 (Miss. 1973).

JURISDICTION

The jurisdiction requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the due process and Fifth Amendment rights of petitioner were violated by certain questions propounded by the prosecutor during his cross-examination and statements made by the District Attorney during his final argument which petitioner urges constituted an impermissible comment on her pre-trial silence.

STATEMENT OF THE CASE

Petitioner was jointly indicted along with four other persons for the crime of grand larceny. A severance was granted, and petitioner was tried, convicted and sentenced to serve a term of four years in the Mississippi State Penitentiary. (Tr. 198)

Shortly before noon on Saturday, May 13, 1974, four women attired in uniforms of various colors entered a supermarket known as Jitney Jungle No. 2 located on U.S. Highway 61, South of Vicksburg, Mississippi. Three grocery checkout stands, each with a cash register, are located near the front of this store. The employee assigned to cash stand No. 1 was in the rear of the store at the time (Tr. 80) and the employee on duty at cash stand No. 3 was checking groceries. (Tr. 59)

Shirley Dement was the cashier at check stand No. 2 and saw petitioner and her three companions enter the store. She identified petitioner in the courtroom as the woman who asked her assistance in locating a product known as lemon ammonia. Mrs. Dement left her register in order to locate the product only to learn none was available. Petitioner then asked about another cleanser as an alternative and then asked for some gelatin whereupon

Mrs. Dement returned to the front of the store and noticed one of the other uniformed women standing near check stand No. 2. Thinking this customer wished to be waited on, Mrs. Dement asked the assistant store manager to assist petitioner in locating the gelatin for petitioner which she subsequently purchased at check stand No. 3.

Petitioner and her three companions were in the supermarket approximately five minutes and shortly thereafter, the employee at check stand No. 1 returned and discovered all the five, ten and twenty dollar bills had been removed from the cash register. (Tr. 80, 81) This she reported to the store manager. (Tr. 21)

Joyce Jones, the manager, testified she had put the money in each of the three cash registers early on the morning of the day in question at which time she recorded the serial numbers of a twenty dollar bill, a ten dollar bill and a five dollar bill and then placed these recorded bills on the bottom of each stack of bills in the separated compartments of the cash register at check stand No. 1. (Tr. 25)

Upon being told of the missing money, Mrs. Jones immediately notified the sheriff who sent a deputy to the scene to talk to the witnesses and employees, one of whom was Willie Nicholson, Jr., a nineteen year old bag boy for the grocery, who had observed the four women when they entered the store and when they left. He noted and reported to the investigating officer that the women had left in a two-tone green Plymouth Fury automobile bearing a Rankin County license tag and driven by a black male. (Tr. 109, 110)

This description was given by the sheriff to the Highway Patrol and pursuant to a radio dispatch of this information, a highway patrolman saw a speeding vehicle fitting the exact description he had received over his radio. He

pulled the vehicle over, advised the five subjects of their rights and detained them until the sheriff arrived accompanied by Mrs. Dement who immediately identified the four women, one of whom was petitioner, as the ones who had been in the supermarket. (Tr. 142)

The sheriff advised the five subjects of their rights under *Miranda*, placed them under arrest and informed them they would be searched at which time one of the women, Harriett Cannon, removed a roll of bills totalling nine hundred and fourteen dollars from her brassiere. (Tr. 143) It was later determined the serial numbers of a five dollar bill, a ten dollar bill and a twenty dollar bill included in the money handed over by Cannon matched the serial numbers of the bills which the store manager had recorded prior to placing the money in the cash register before the start of the business day. (Tr. 33)

Petitioner, her three female companions and Johnny Chapman, the only male, were taken to the county jail. Harriett Cannon told the sheriff the four women had made the money by working as prostitutes in New Orleans. Deputy Sheriff Reed testified, "[S]he (Cannon) said they had all made this money in New Orleans. And the other three was present when she was making this statement. They agreed that this were all their money, nine hundred and fourteen dollars." (Tr. 152, 157, 159)

Petitioner took the stand and testified she knew nothing of a plan to rob the supermarket and only entered the store in order to purchase a cleaning product which she intended to use at the motel where she was employed. (Tr. 165) She denied doing anything to aid or assist in the robbery. (Tr. 174, 175)

Petitioner stated that after the group left the supermarket they headed towards Jackson and at one point Johnny Chapman, the driver, ". . . said the jump-suit he

was wearing, he said, 'I'm tired. Somebody come on and drive. This thing is bothering me.' Or something to that effect. He said the jump-suit was worrying him. So he said, 'who have a license?' I said, 'I have a driver's license.' So he said, 'Come on and drive awhile.' I was sitting in the back. I got in the front and drove, and he got in the back." (Tr. 183) The jump suit was then stuffed under the car seat. (Tr. 168)

When asked on direct examination why she had agreed with the story that the money had been made by prostituting in New Orleans, petitioner replied, "[b]ecause I really—I didn't know what I had got myself into. And I figured I had better stick with what the crowd said. I didn't know what any of them would do to me if I would squak, or, you know, just—give any kind of statement at all. I didn't say anything until I could get to my lawyer or somebody that could tell me something. I shouldn't have said anything at all. I shouldn't have even nodded my head now." (Tr. 169)

On cross-examination, the following colloquy occurred:

> Q. Now, how come you made a claim to that nine hundred and fourteen dollars as being a prostitute?
>
> A. Cause I didn't know, up until the man told me where it came from, I didn't know what kind of trouble I was in; so I went along with the group until I could get somebody to give me some assistance, some legal assistance.
>
> Q. Of course, you didn't tell any of the law enforcement officers until you got on the witness stand, did you?
>
> By Mr. Thames: We object to the form of the question because, of course, that's her constitutional right not to.

By the Court: Well, I'll overrule the objection.

(Mr. Ellis resumes examination of witness.)

Q. And you didn't tell this until you got on the witness stand to any of the law enforcement officers, did you?

A. No, sir.

By Mr. Thames: We renew our objection that on the grounds that under the Constitution a Defendant's silence cannot be held against her, and the form of the question and implications flowing therefrom violates the constitutional right to remain silent prior to trial.

By the Court: Well, the objection will be overruled.

(Mr. Ellis resumes examination of witness.)

Q. All right. You answered, "No." You answered, that you didn't, just a few moments ago, is that right?

A. Yes. (Tr. 176-177)

After petitioner was convicted and sentenced, a Bill of Exceptions was signed by the trial judge. In the pertinent part of that Bill of Exceptions the following statement was attributed to the prosecutor during his final argument:

> Remember that the Defendant said while she was in jail that she had an interest in the stolen money. That statement of hers has gone undenied since May when this thing happened. The Grand Jury met in July and she did not come out and change her story or deny the truth of it. She has been indicted since then, and still she has not changed that story she told in the jail and has remained quiet about the story being false until yesterday when she took the stand here in this Court room. (Tr. 205)

Objection by the defense was interposed on grounds such a statement constituted a violation of the "Constitutional right of the Defendant to be secure from having any comment made about her silence and being a violation of her other Constitutional right protecting her self-incrimination and from not having to make any statements on the merits of her case until her trial." (Tr. 205) The objection of the Defendant was overruled and the motion for a mistrial was denied. (Tr. 206)

In his ruling on the Bill of Exceptions the trial judge held:

> In passing upon this Bill of Exceptions tendered by Counsel for Defendant, as to the statement attributed to the County Attorney the Court concluded that State counsel was merely pointing up an inconsistency between the statement made by Defendant to law officers at time of arrest and that made by her on the witness stand, which has been often held to be entirely proper. It did not constitute any violation of her constitutional right to remain silent, since she had volunteered the statement, nor did it constitute a comment on her failure to testify,—since she did actually take the stand and testify. (Tr. 207)

On appeal to the Mississippi Supreme Court petitioner's conviction was affirmed. Addressing the specific issue now presented to this Court the Supreme Court of Mississippi held:

> [t]he cross-examination of the appellant by the State, after she had voluntarily taken the stand in her own defense and after she had admitted her previous statement was untrue and after she had attempted to explain it away, was legitimate cross-examination, and not a comment on her pretrial silence. (Petitioner's Appendix A, p. A-7)

REASONS FOR DENYING THE WRIT

No question of substance is presented by petitioner's assertion that her right to pre-trial silence was violated when the prosecutor pointed out the inconsistency of petitioner's volunteered claim of joint ownership of the money which she made at the time of her arrest and her subsequent denial of any knowledge of the money as she later testified about at her trial.

Furthermore, the opinion of the Mississippi Supreme Court is not at variance with the applicable decisions of this Court.

ARGUMENT

It is the position of respondent that the three cases relied upon in support of petitioner's contention have absolutely no applicability to the facts now reviewed.

Certainly the scope of the privilege against self-incrimination was expounded in *Griffin* v. *California*, 380 U.S. 609 (1965), when this Court declared that the privilege barred any potentially adverse comment by either the Court or the prosecutor in the event a defendant failed to take the stand. However, in the instant case, petitioner voluntarily took the stand in her defense and on direct examination readily admitted that the story she told the sheriff was false, that the women had not made the money by engaging in prostitution and that she had only gone along with that version until she could secure a lawyer. (Tr. 168, 169) The fact remains that version was not contradicted until she did so herself when she took the stand.

On cross-examination, the prosecutor questioned petitioner about the explanation offered the officer at the time

of her arrest and her subsequent testimony at trial in which she denied any knowledge of or participation in the robbery. In *Grunewald* v. *United States*, 353 U.S. 391 (1957), it was held:

> It is, of course, an elementary rule of evidence that prior statements may be used to impeach the credibility of a criminal defendant or an ordinary witness. But this can be done only if the judge is satisfied that the prior statements are in fact inconsistent. (1 L.Ed.2d 931 at 951)

Again, it is emphasized that here petitioner, under questioning by her own attorney, freely admitted the falsity of her original version told to officer when she was arrested.

The Fifth Circuit case of *United States* v. *Pledger*, 409 F.2d 1335 (5th Cir. 1969), citing *Grunewald*, supra, held:

> When an accused testifies voluntarily he waives his privilege against self incrimination, and his failure to deny or explain evidence against him, which he might naturally explain is open to adverse inference. (409 F.2d at 1336)

Petitioner seems to suggest that her right to remain silent also cloaked her with a co-equal right not to have the jury know of prior inconsistent statements which were not altered until she took the stand and first admitted their falsity under questioning by her own attorney. Respondent submits no such privilege was available to her then nor is it now.

CONCLUSION

Respondent respectfully submits that the petition for writ of certiorari should be denied and that the judgment of the Mississippi Supreme Court be affirmed.

Respectfully submitted,

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CERTIFICATE

I, Karen Gilfoy, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of Mississippi, to William Sebastian Moore, 514 Barnett Building, Jackson, Mississippi 39201, Attorney for Petitioner.

This the 19th day of June, A.D., 1974.

KAREN GILFOY
Special Assistant Attorney General